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91-420

Supreme Court, U.S.
FILED

AUG 21 1991

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

GORDON BELLIS AND CATHY BELLIS

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On a Writ of Certiorari from the Court
of Appeal for the Ninth Circuit

Petition for Certiorari

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August 12, 1991

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QUESTIONS PRESENTED

1. Whether petitioners were deprived of due process of law when the notice of deficiency, which was sent to their last known address by certified mail, was not delivered because of an intervening event which prevented delivery.

2. Whether the Commissioner of Internal Revenue had a more reliable alternative to assure that the notice of deficiency was delivered to the addressee, which alternative should have been used pursuant to the due process requirements of the Constitution.



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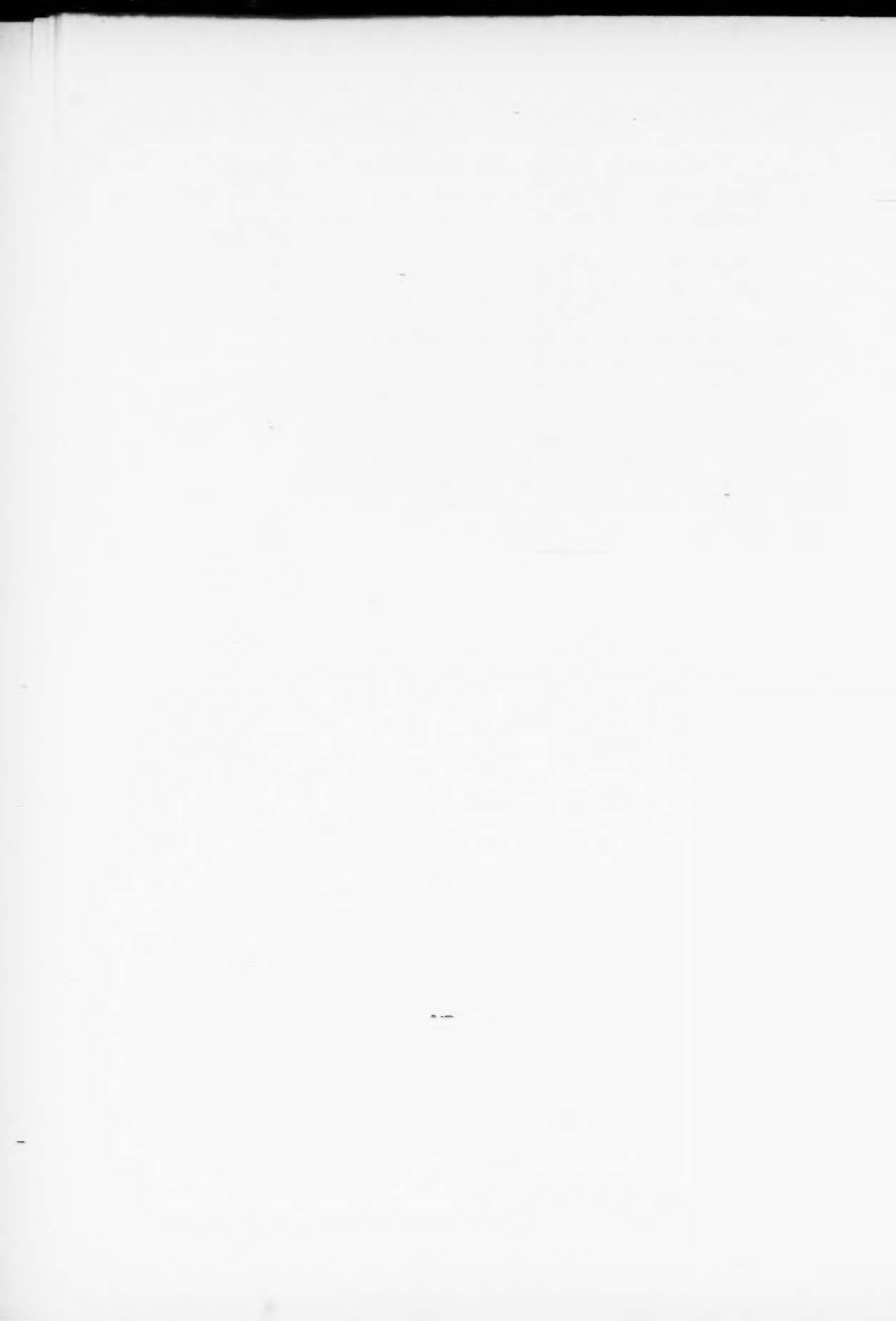
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

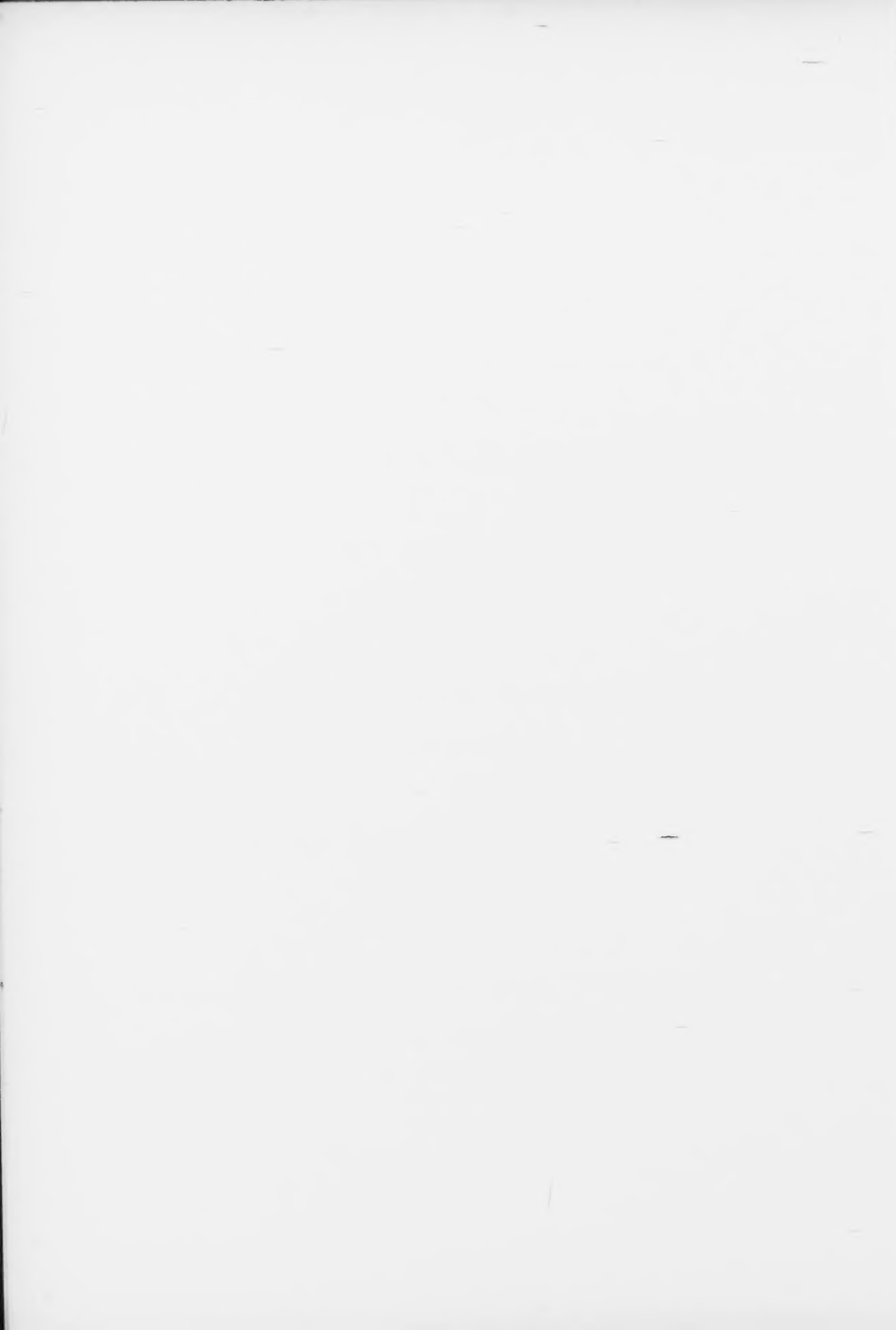
OCTOBER TERM 1991

GORDON BELLIS AND CATHY BELLIS,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE
Respondent.

On a Writ of Certiorari from the Court
of Appeals for the Ninth Circuit

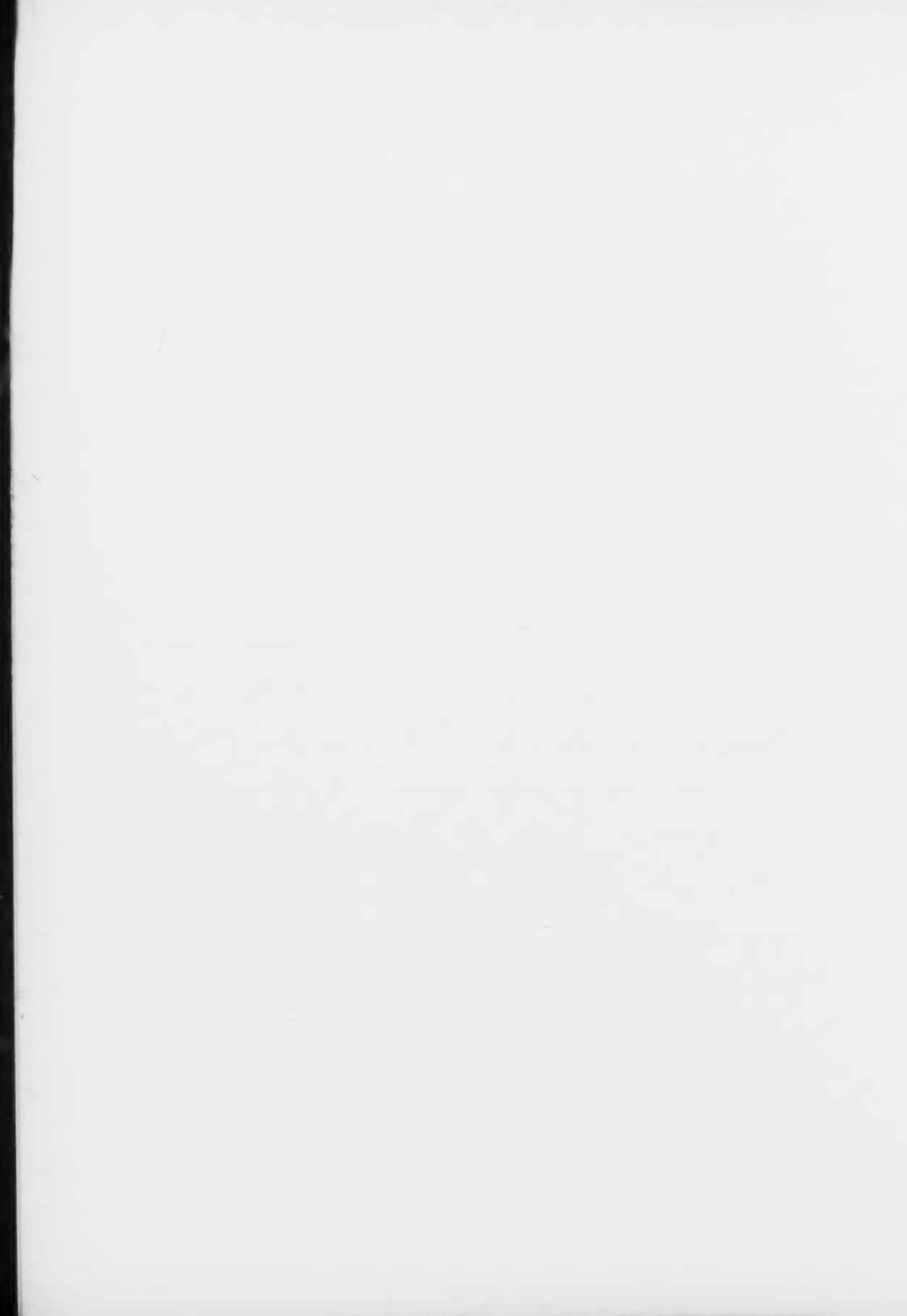


PETITION FOR CERTIORARI

The petitioners herein respectfully pray that a writ of certiorari issue to review the Ninth Circuit Court of Appeal's affirmance of a decision of the United States Tax Court, which Ninth Circuit decision was filed June 7, 1991. No petition for rehearing was filed.

OPINIONS BELOW

The decision of the United States Tax Court in Gordon and Cathy Bellis v. Commissioner of the Internal Revenue, was filed June 8, 1989 and is reported in T.C. MEMO. 1989 - 277, 57 T.C.M. (CCH) 667 (1989). The United States Tax Court's decision, which is reproduced in Appendix A, was affirmed by the Ninth Circuit Court of Appeals in an unpublished decision which is reproduced in



Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals was entered on June 7, 1991. This petition was timely filed within 90 days of the date of the Ninth Circuit Court of Appeals decision.

CONSTITUTIONAL AND STATUTORY

PROVISIONS INVOLVED

1. The Due Process Clause of the Fifth Amendment (U.S. CONST., Amend. V) provides that no person shall be "deprived of property without due process of law...."

2. Section 6212(a) of the Internal Revenue Code of 1954 (26 U.S.C.) provides:

If the Secretary determines that there is

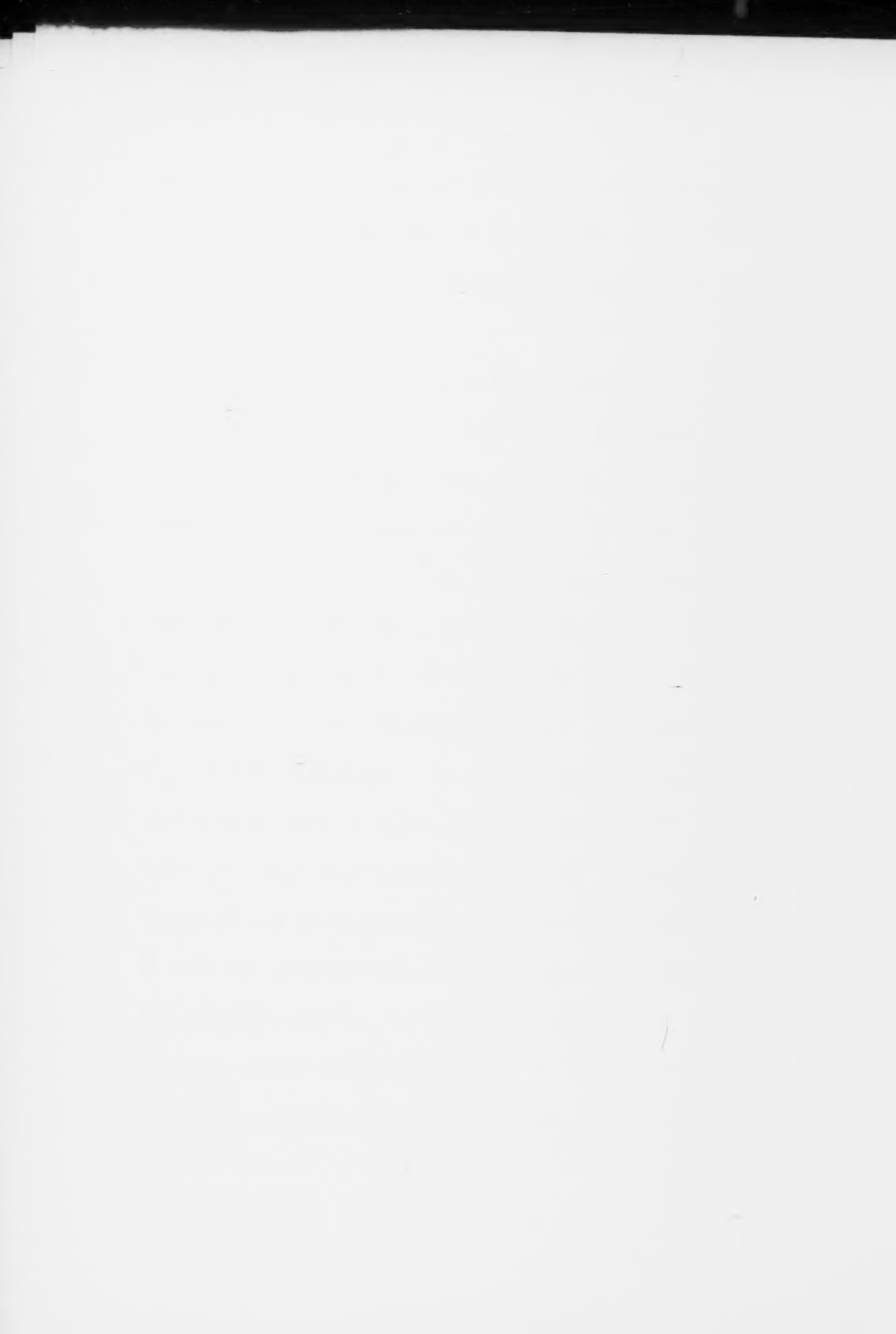
a deficiency in respect to any tax..., he is authorized to send notice of such deficiency to the taxpayer by certified or registered mail.

3. Section 6212(b) of the Internal Revenue Code of 1954 (26 U.S.C.) provides:

[N]otice of a deficiency in respect to a tax...if mailed to the taxpayer at his last known address should be sufficient....

4. Section 6213(a) of the Internal Revenue Code of 1954 (26 U.S.C.) provides:

Within 90 days,...after the notice of deficiency authorized in section 6212 is mailed...the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency...no amount of deficiency in respect to any tax...and no levy on proceeding in court for its collection shall be made, begun or prosecuted until such notice has been mailed to the taxpayer, nor until expiration of such



90 day or 150 day period....

5. Section 6213(c) of the Internal Revenue Code of 1954 (26 U.S.C.) provides:

If the taxpayer does not file a petition with the Tax Court within the time provided in subsection (a), the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the Secretary.

STATEMENT OF THE CASE

A. Course of Proceedings in the Case before the Court.

This case arose upon petition to the United States Tax Court. The Commissioner filed a motion to dismiss for lack of jurisdiction on the grounds that the petition was not filed within 90 days of the date the



notice of deficiency was mailed as required by section 6213(a)¹. The Tax Court granted the motion. Certain issues were appealed to the Court of Appeals for the Ninth Circuit. The Tax Court was affirmed. The Court of Appeals had jurisdiction to hear the appeal under section 7482(a).

B. Relevant facts concerning questions presented.

Gordon and Cathy Bellis (Bellis) resided at 2504 Scott Street, San Francisco, California, and have resided at that address for over 20 years.

On May 29, 1987, the Commissioner of Internal Revenue (Commissioner) determined a

¹ All references to section are to the Internal Revenue Code.



deficiency in reported income for the year 1984, and sent a notice of deficiency (Notice) on that date to Bellis. The notice was sent by certified mail to Bellis' residence at 2504 Scott Street, San Francisco, California.

The Postal Service delivered the notice on June 1, 1987, to Bellis' residence. The "Delivery Notice and Receipt" showed that someone received and signed the name of Cathy Bellis to the receipt. The signature was not that of Cathy Bellis.

In 1988, the Commissioner initiated collection activities with respect to the 1984 tax deficiency. Bellis thereafter filed a petition with the Tax Court, which was dismissed based on a motion for lack of jurisdiction.



REASONS FOR GRANTING THE WRIT

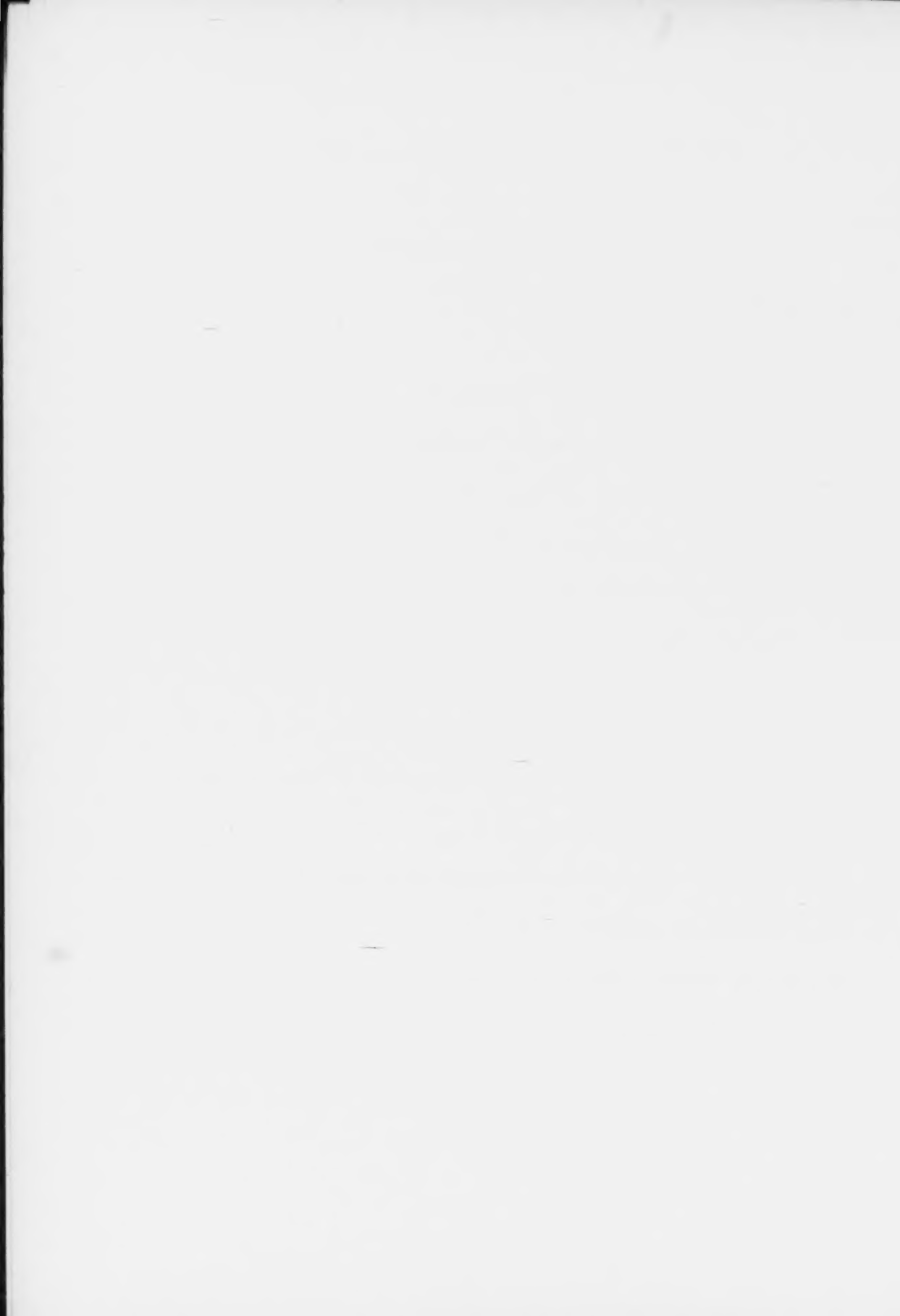
A. The Importance and Substantiality of the Questions Presented.

Bellis has been deprived of due process as espoused by this Court in Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, (1950). In Mullane at 314, this court said:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties....

Publication to notify known beneficiaries was insufficient in Mullane, when the beneficiaries addresses were known.

A fundamental requisite of due process is the opportunity to be heard. This right "has



little reality, or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." Greene v. Lindsay, 456 U.S.444 (1982).

The holding in Mullane, supra, requiring "notice reasonably calculated" to notify a party has been applied by this court in unlawful detainer actions in (Greene v. Lindsay, supra), notice of sale of property for non-payment of property taxes in Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983), and most recently in requiring notice other than by publication to an estate's creditors who would be barred by the non-claim statute in Tulsa Professional Collection Services Inc. v. Pope, 425 U.S. 478 (1988).

Bellis was never informed of the proposed tax deficiency even though the notice was sent to the last known address by certified mail.



This was the result of an intervening party forging Cathy Bellis' signature. The receipt may have been signed by an errant postal employee or a third party who never gave the notice to Bellis. The reasons for such behavior are obvious because government envelopes often contain checks and provide easy targets for thieves.

The Ninth Circuit in its opinion only required that the notice be sent to the last known address irrespective that the notice may never have been received because of an intervening third party.

This Court has voiced its concern to protect parties so that they will have an opportunity to be heard. It is submitted that there is no more appropriate case to present the questions posed by this writ.

1. The Court should decide whether due process is violated when a notice is not

received because of intervening events.

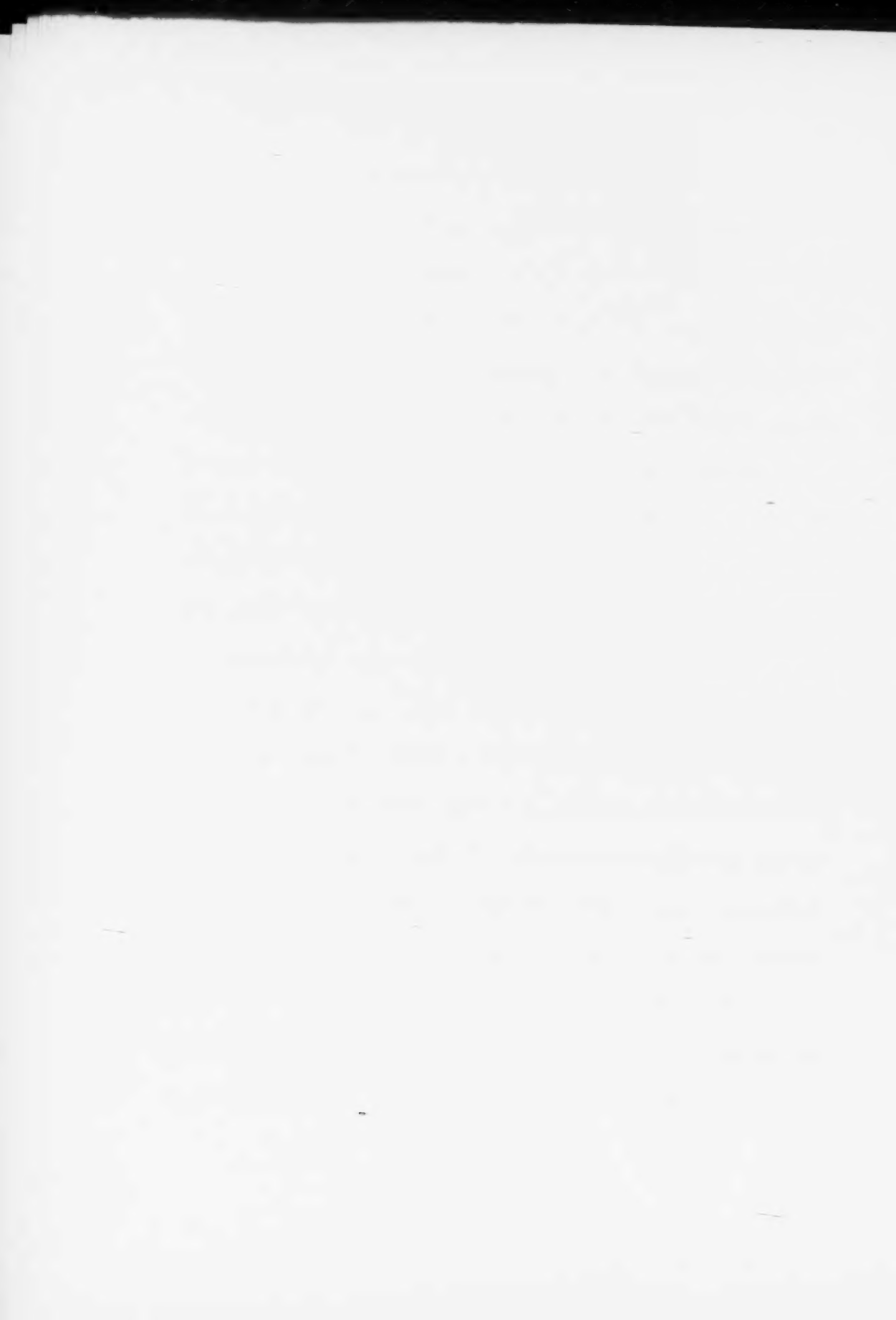
Section 6212(a) provides that the Secretary is authorized to send a deficiency notice to a taxpayer at his/her last known address by certified mail if the Secretary determines a deficiency. The mailing process contemplates that the 90-day letter will actually be delivered to the address thereon and, if no one is present at the address, a notice of attempted delivery will be left so that the letter can be obtained at the post office. If the customary delivery process is aborted or interfered with so that the 90-day letter does not reach its destination in the customary manner, it is submitted that the mailing process is invalid and the 90-day letter is thus void.

The Ninth Circuit in the case at issue as well as other courts have answered by stating that the statute does not require actual



receipt of notice if the notice is sent to the last known address. King v. Commissioner, 857 F2d 676,679 (9th Cir. 1988); Cataldo v. Commissioner, 60 T.C. 522 (1973), aff'd 499 F2d 55 (2nd Cir. 1974); Leask v. Commissioner, T.C. Memo, 1989-347, 57 T.C.M. (C.C.H.) 1000 (1989).

Exceptions to the literal application of mailing to the last known address have been carved out by the Courts. The Courts have invalidated notices, even though the mailing procedure satisfied the literal language of sections 6212(a) and (b). Abeles v. Commissioner, 91 T.C. 65 (1988) [Commissioner had a duty to ascertain the last known address based on circumstances at the time of mailing. Spouses who had filed joint returns had separated and their latest return address from separate returns should have been used.] See Borrison, The Evolving Due Diligence Requirement of the Service in Determining a



Taxpayers' Last Known Address, 41 Tax Law Rev.
111 (1985).

Another exception was the result of postal mishandling where the Court held the mailing invalid. Estate of McKaig v. Commissioner, 51 T.C. 331 (1968) [notice mailed to a Bellaire, Texas address, but the postal employee struck out the Bellaire address and inserted a Houston address. Therefore, the notice could not be delivered.]

The exceptions to the presumption of receipt if mailed to the last known address are the result of lack of delivery. The reasoning of the courts is based on the technical exceptions which amount to a due process requirement of delivery. In the case at issue, the Post Office never completed delivery due to an unauthorized intervention. Regardless of fault, the Commissioner cannot claim the benefit of section 6212(b) based on an



incomplete or abated mailing. Also see Rogers v. Commissioner, 57 T.C. 711 (1972), where notice could not be delivered to Honduras because certified mail is limited to the United States.

2. The court should decide whether the Commissioner had an alternative means to perfect notice to assure receipt as required by the due process.

A notice is similar to a summons or other process which invokes the jurisdiction of a court.

A summons or process must give a defendant reasonable notice and an opportunity to be heard before a final judicial determination resulting in the taking defendant's property. In giving notice, the means employed must be similar to those employed by one desirous of actually informing the defendant. Mullane v. Central Hanover Bank & Trust Co., supra.

The Constitution does not prescribe a particular form of notice. However, the method must be "reasonably" likely to provide actual notice.

The Postal Service provides a service whereby a letter can be sent by certified mail, restricted delivery. With restricted delivery, the postal employee must have identification of the addressee (or a person authorized in writing) before turning over the letter.

Here, as in Greene, supra, the notice was defective, due to a failure to use a reasonable and customary alternative to unrestricted delivery. Restricted delivery would have eliminated (or at least greatly reduced) the chance of theft or misdirection. It would have increased the likelihood of petitioners actually receiving the notice. It would impose little expense or other burden on the Commissioner. The cost of restricted delivery

is \$1.25 per item.

Further, as in Mennonite Board of Missions, supra, the mailing procedure used provides no assurance that any mail delivered by the Post Office to petitioners will be turned over to petitioners.

With unrestricted delivery, the Post Office delivers mail to an address not a person. The Post Office does not ask for identification from the person signing the delivery receipt. This procedure requires no privity or other relationship between the addressee and the person signing the mailing receipt. The persons signing the delivery receipt may or may not feel obligated to turn the mail over to the addressee.

In comparable situations, the Federal Rules of Civil Procedure require a return acknowledgement by a defendant in order to validate service of process by mail. These



rules also recognize substituted service. There, the process server leaves the summons in care of a resident or person of sound age and discretion. Fed. R. Civ. Proc. 4(c)(2)(ii) and 4(d)(1).

Presumably, the drafters of the Federal Rules foresaw the need for safeguards on substituted service to insure a degree of privacy between the person receiving the summons and the defendant. The Commissioner's procedures provide no such safeguards.

For the above reasons, section 6212(b) violates petitioners' rights to due process of law, under the Fifth Amendment as it applies in the circumstances of this case.

It has been argued that due process cannot be violated when taxpayers have refund litigation rights. Notwithstanding, it is submitted that constitutional constraints apply where, as here, Congress provides a statutory



procedure for contesting alleged tax deficiencies without having to first pay the alleged deficiencies in full. This is a substantial and very significant right. Otherwise, those who cannot afford to pay are foreclosed from appeal of the Commissioner's determinations. Also even those who are in a position to pay first are deprived of substantial assets over a lengthy litigation period.

Finally, it is submitted that the current ordinary certified mail procedure has the curious aspect of not requiring identification of the recipient when someone is present to take possession of the certified letter when presented at the address on the article, but if no one is present to receive the letter at the address, the letter is returned to the post office for pickup. When the addressee must secure the article at the post office,

identification is required. This procedure thus discriminates depending upon whether "anyone" is present at the addressed location to sign for the mail. There is no rational basis for such a distinction, which raises an equal protection of the law issue.

CONCLUSION

This case presents a unique opportunity for the Court to decide a fundamental issue of due process where a taxpayer was deprived of his right to petition the United States Tax Court because intervening events prevented the taxpayer from receiving the notice in order to file a timely Tax Court Petition.

The Court also has the unique opportunity in this case to determine whether an alternative means of restricted delivery is better calculated to notify a taxpayer and,

therefore, should have been used rather than mailing by certified mail.

For the foregoing, it is submitted that this Petition for Certiorari should be granted.

Respectfully Submitted,

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/s/ JOHN GIGOUNAS

By: _____

John Gigounas
(Counsel of Record)

Attorney for Petitioners

Dated: August 12, 1991

APPENDIX

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T.C. Memo. 1989-277

UNITED STATES TAX COURT

GORDON AND CATHY BELLIS, Petitioners v.
COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 9715-88 Filed June 8, 1989

Edward B. Simpson, John Gigounas and James
Booher, for the petitioners.

Anne M. Murphy, for the respondent.

MEMORANDUM OPINION

GERBER, Judge: This case is before the Court on respondent's motion to dismiss for lack of jurisdiction. We held a hearing on the motion on December 9, 1988, and received stipulations, testimony and exhibits. The findings of fact and opinion are combined for simplicity. For purposes of this opinion, petitioners will refer to Gordon and Cathy Bellis, although petitioner Cathy Bellis died after their petition was filed. All section

references are to the Internal Revenue Code as amended and in effect for the year at issue. The issue for our consideration is whether respondent may properly use ordinary certified mail to send notices of deficiency consistent with section 6212 and the Fifth Amendment due process clause.

Petitioners resided at 2504 Scott Street in San Francisco, California, and have resided at that address for approximately 20 years. On May 29, 1987, respondent mailed petitioners a notice of deficiency for taxable year 1984 by certified mail to the Scott Street address. The Postal Service delivered the notice on June 1, 1987. PS Form 3849-A, Delivery Notice or Receipt, showed someone received the notice who signed the name Cathy Bellis. This signature was different than the signature appearing on some of Cathy Bellis' checks. The petition in this case was filed May 9, 1988.

Petitioners had received other notices of deficiency for earlier taxable years. For such earlier years, petitioners had referred the matters to tax counsel, petitioned the Tax Court, and later settled.

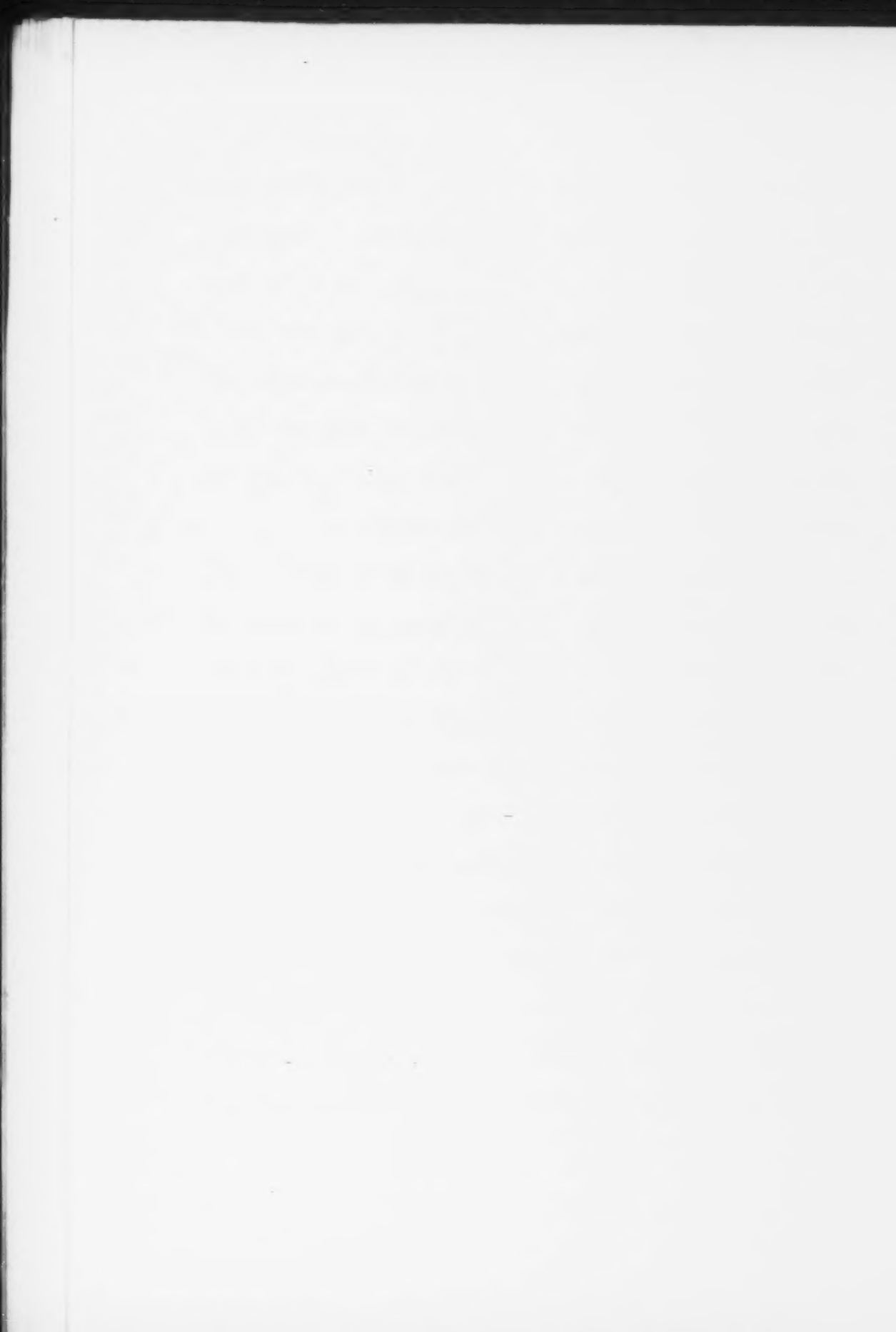
Certified mail provides the sender with a mailing receipt and a record of delivery at the address. The Post Office obtains a receipt for delivery to the address on PS Form 3849-A. When delivering certified mail, the Post Office does not ask for identification from the person receiving the mail or signing the delivery receipt. For an additional fee, the Post Office will provide "restricted delivery" service. With restricted delivery, the postal employee will ask for identification from an individual receiving certified mail. Respondent does not use the restricted delivery service when mailing notices of deficiency.

This Court lacks jurisdiction if the



petition is not filed within 90 days after the notice of deficiency is mailed. Section 6213(a); Cataldo v. Commissioner, 60 T.C. 522 (1973), affd. per curiam 499 F.2d 550 (2d Cir. 1974). Since the petition in this case was not filed until May 1988, respondent argues that we lack jurisdiction because the notice of deficiency was mailed in May 1987.

Section 6212(a) provides that the Secretary is authorized to send a notice of deficiency to the taxpayer by "certified mail or registered mail." The notice of deficiency is sufficient if mailed to the taxpayer at his last known address. Section 6212(b)(1). Petitioners argue that respondent bears the burden of proving actual delivery, that respondent is required to use restricted delivery certified mail, and that mailing by ordinary certified mail deprives petitioners of due process of law where petitioners did not



receive notice.

Even if petitioners did not receive the notice of deficiency, that does not affect its validity. There is nothing in the statute requiring actual receipt of the notice by petitioners. Cataldo v. Commissioner, supra; Houghton v. Commissioner, 48 T.C. 656, 660 (1967). "Congress, when it authorized service by registered mail, did not intend to require actual receipt by the addressee of the letter. Rather, it permitted the use of a method of giving notice that would ordinarily result in such receipt." Cohen v. United States, 297 F.2d 760, 772 (9th Cir. 1962). Respondent has proven with postal service records and petitioners have stipulated to the fact that the notice of deficiency was mailed on May 29, 1987. This is sufficient. Zolla v. Commissioner, 7724 F.2d 808 (9th Cir. 1984). Respondent mailed the notice to petitioners'



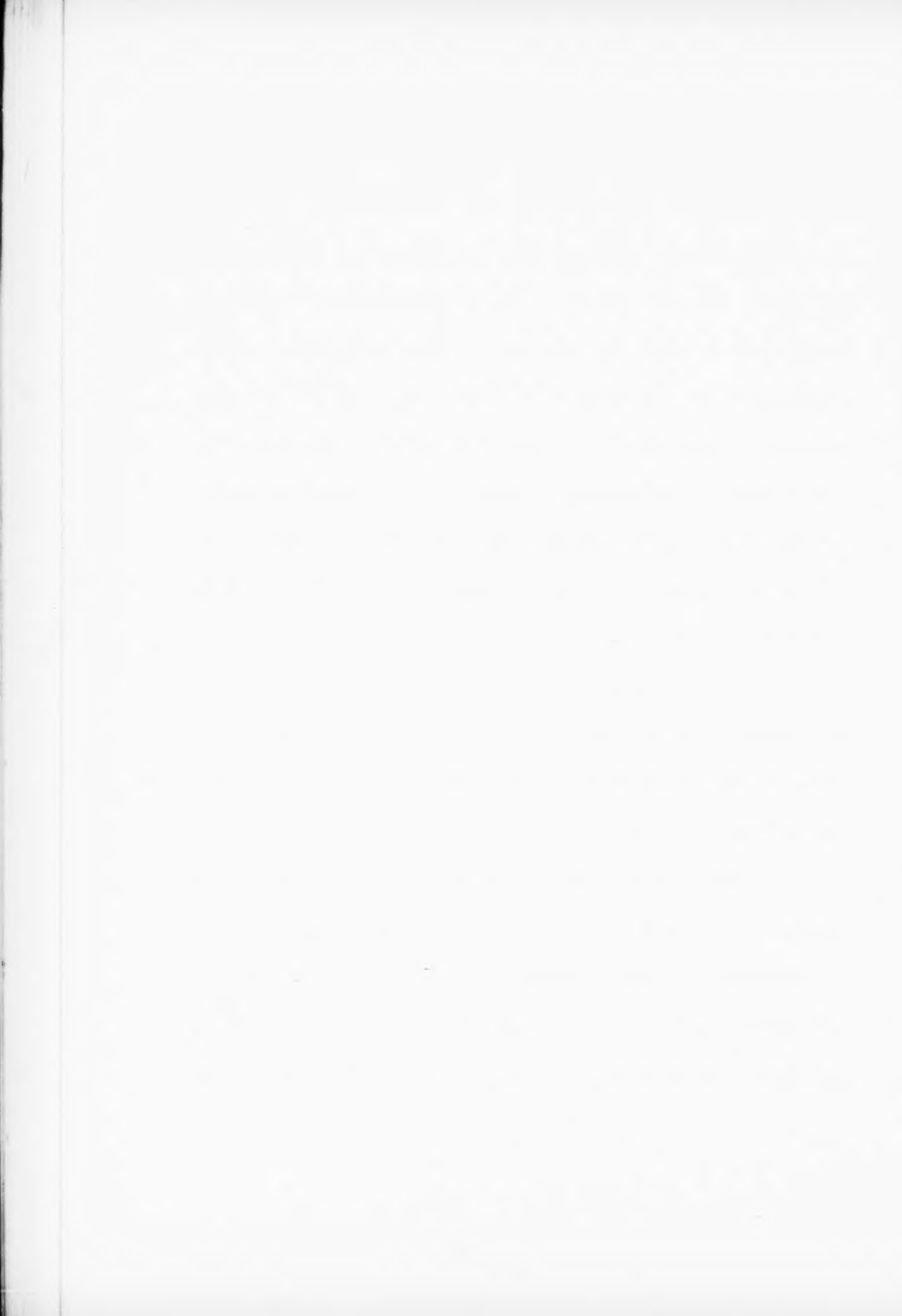
last known address, their residence for the past 20 years. Estate of McKaig v. Commissioner, 51 T.C. 331 (1968), is inapposite because that case involved what constituted the proper last known address, a contention not at issue here. Finally, the notice was properly delivered to the correct address, although there is some doubt that Cathy Bellis signed the delivery receipt. We find that the notice was validly mailed. Zenco Engineering Corp. v. Commissioner, 75 T.C. 318, (1980), *affd.* 673 F.2d 1332 (7th Cir. 1981).

Petitioners' other contentions also lack merit. The statute expressly states that respondent is authorized to send notices of deficiency by certified mail, without any other directive. There is nothing in the legislative history of what is now section 6212 to indicate that Congress intended deficiency notices be mailed certified and with restricted delivery.



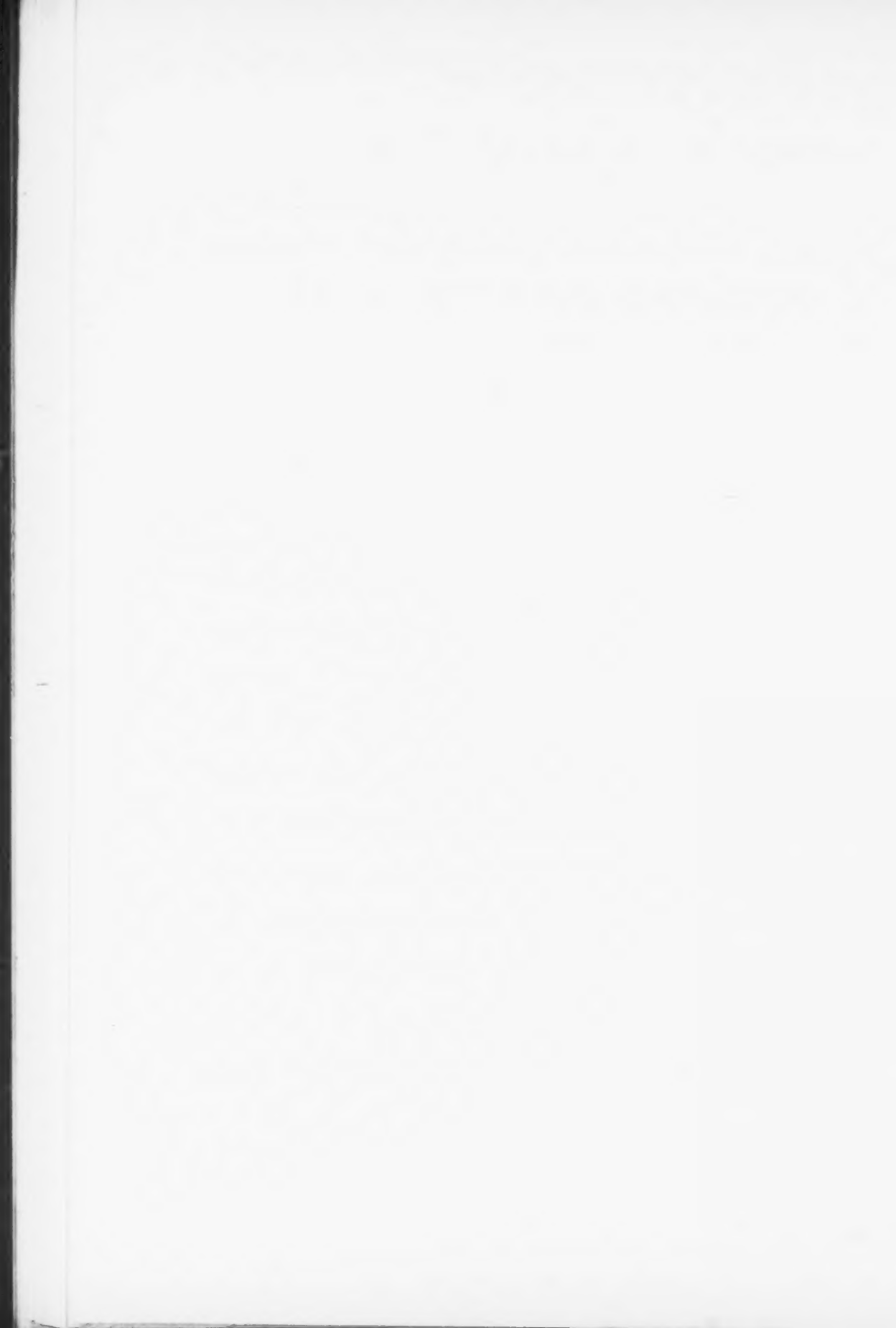
65 Cong. Rec. 2970 (1924) [statement of Rep. Chindblom]. Further, if Congress, or a Court, intends to require delivery of documents or service of papers in a specified manner, they know how to do so. See section 7603 (service of summons); Fed. R. Civ. P. 4. Absent specific congressional directive, ordinary certified mail is sufficient. Eisenberg v. Commissioner, T.C. Memo. 1983-767, affd. without published opinion 753 F.2d 1078 (7th Cir. 1985).

Finally, petitioners' constitutional due process claims do not aid them. The Fifth Amendment prohibits the taking by the Federal Government of property without due process of law. This includes notice of a proceeding taking property. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the



circumstances, to apprise interested parties of the pendency of the action***." Greene v. Lindsay, 456 U.S. 444, 449-450 (1982); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). Preliminarily, there is considerable doubt whether petitioners' inability to litigate in this Court constitutes a final determination of a judicial taking. Petitioners can still pay the tax and sue for a refund. See section 7422. Any determination that we lack jurisdiction does not bar a refund suit on the underlying merits. In that sense, it is not final. "We have no doubt that the Congress, if it chose to do so, could have required the taxpayer to pay first and then litigate, in all cases." Cohen v. United States, supra at 772. See Phillips v. Commissioner, 283 U.S. 589 (1931); Tavares v. United States, 491 F.2d 725 (9th Cir. 1974).

More important, ordinary certified mail



ensures delivery to a particular address, and makes it more than reasonably likely that petitioners would receive the notice. This is especially so under the statutory requirement that it be sent to the last known address. "[T]he mails provide an efficient and inexpensive means of communication,'*** upon which prudent men will ordinarily rely in the conduct of important affairs***." Greene v. Lindsay, supra at 455. The efficacy of respondent's procedure is underlined by petitioner's "explanation" of why the notice was purportedly not delivered. Petitioners contend it was intercepted by someone, not Cathy Bellis, who signed her name and made off with the notice. Even if we could accept such an explanation, which we do not, the unlikelihood of such an occurrence does not raise the spectre of Fifth Amendment due process difficulties. We hold that the notice

requirement of the due process clause is sufficiently met by respondent mailing deficiency notices by ordinary certified mail.

We are convinced respondent mailed the notice of deficiency to petitioners' last known address, and that is all that is statutorily and constitutionally required. To reflect the foregoing,

An appropriate order will be
issued granting respondent's
motion to dismiss for lack of
jurisdiction.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GORDON BELLIS; CATHY BELLIS,)	No. 89-70337
)	
Petitioners-Appellants,)	Tax Ct. No.
)	9715-88
v.)	
)	MEMORANDUM*
COMMISSIONER, INTERNAL)	
REVENUE SERVICE,)	
)	
Respondent-Appellee.)	

Appeal from a Decision of the
Tax Court of the United States

Argued and Submitted December 12, 1990
Pasadena, California
[Filed June 7, 1991]

BEFORE: HUG, BEEZER, and BRUNETTI,
Circuit Judges

Petitioners appeal from an order of the
tax court granting the Tax Commissioner's
motion to dismiss a petition for
redetermination of tax liability. We affirm.

*This disposition is not appropriate for
publication and may not be cited to or by the
courts of this circuit except as provided by
Circuit Rule 36-3.

STATEMENT OF FACTS

In 1987, the Commissioner of Internal Revenue (Commissioner) determined a deficiency in the reported income of petitioners Gordon and Cathy Bellis (Petitioners) for the year 1984. On May 29, 1987, a notice of deficiency was sent by certified mail to Petitioners' residence at 2504 Scott Street, San Francisco, California. The Postal Service delivered the deficiency notice to Petitioners' address on June 1, 1987. The "Delivery Notice or Receipt" form indicates that someone at the residence received the letter and signed the name Cathy Bellis to the receipt. The signature on the receipt is different than that acknowledged as Cathy Bellis' signature on various checks presented to the Tax Court.

In 1988, the IRS initiated collection activities with respect to Petitioners' unpaid



1984 deficiency. After receiving notice that a tax lien had been placed on their property, Petitioners filed a petition for redetermination of their tax liability on May 9, 1988.

On June 24, 1988, the Commissioner filed a motion with the Tax Court to dismiss the petition for lack of jurisdiction on the ground that the petition was not filed within 90 days of the date the deficiency notice was mailed, as required by 26 U.S.C. Section 6213(a).

The Tax Court filed a memorandum opinion on June 8, 1989, granting the Commissioner's motion on the grounds that the notice of deficiency was mailed as statutorily required, and that a restricted delivery scheme was not required or envisioned by the Internal Revenue Code.

The formal order of dismissal was filed on June 13, 1989. It is from this order that

Petitioners appeal.

DISCUSSION

A. Tax Code Issues

"It is well-settled that to maintain an action in [the tax court] there must be a valid notice of deficiency and a timely filed petition." Leask v. C.I.R., 57 T.C.M. 1000, 1001 (1989). Section 6212(b) of the Internal Revenue Code explicitly provides that a "notice of deficiency.....if mailed to the taxpayer at his last known address, shall be sufficient." 26 U.S.C. Section 6212(b). The fact that the notice is never actually received by the taxpayer does not make it invalid. See King v. Commissioner, 8577 F.2d 676, 679 (9th Cir. 1988; Mulvania v. Commissioner, 769 F.2d 1376, 1379 (9th Cir. 1985); United States v. Zolla, 724 F.2d 808, 810 (9th Cir.), cert. denied 469



U.S. 830 (1984); Leask, 57 T.C.M. at 1002 ("actual receipt is not required when [the Commissioner] meets the conditions of section 6212(a) and (b)(1)").

The parties in this case have stipulated to the fact that the Commissioner mailed the notice of deficiency by certified mail pursuant to 26 U.S.C. Section 6212(a). "There is a strong presumption in the law that a properly addressed letter will be delivered, or offered for delivery, to the addressee." Zenco Engineering Co. v. C.I.R., 75 T.C. 318, 323 (1980). Petitioners' protestations to the contrary, the fact that the notice was allegedly never received is irrelevant in determining whether the 90-day period for filing a petition had expired.

Petitioners argue that a notice of deficiency under Section 6212 is invalid if not delivered. The law of this circuit squarely

rejects this contention, and the cases cited by Petitioners in support of their argument are not on point.

In McKaig v. C.I.R., 51 T.C. 331 (1968), the notice of deficiency was not received by the taxpayer because a postal employee changed the address on the certified mail form and directed the notice to an undeliverable address. Here, by contrast, the certified mail was correctly addressed, and the certified mail receipt shows that the notice was delivered to Petitioners' residence. The McKaig holding is inapplicable unless the taxpayer presents some proof of error in delivery by the postal service. No evidence was presented to the tax court that would in any way indicate that the postal service erred in delivering the notice to petitioners' address. See also Leask, 57 T.C.M. at 1002 (McKaig holding inapplicable unless notice improperly addressed, or taxpayer



presents proof of "error in postal delivery"). Because petitioners have not made any showing that the notice was improperly addressed, or that an error in postal delivery was made, but merely alleged that some unknown person forged petitioner Cathy Bellis' signature to the Delivery Notice, we cannot find that the mailing of the notice was not completed.

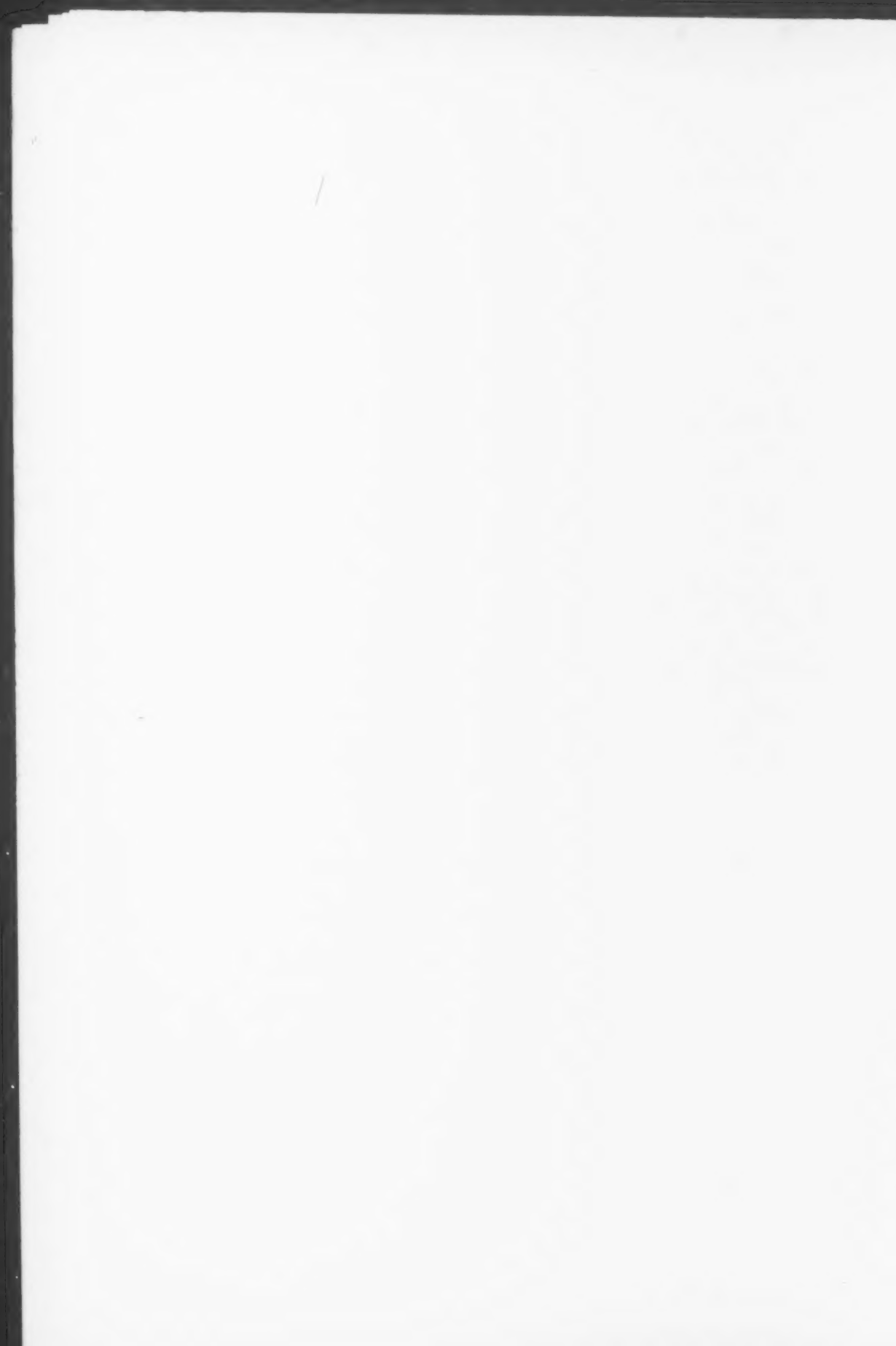
In Rogers v. C.I.R., 57 T.C. 7711 (1972), the Tax Court held that mailing of a notice which was returned as undeliverable would not start the 90-day period for filing a petition. Id. at 712. In the instant case, the notice was delivered to Petitioners' address and not returned to the Commissioner as undeliverable, so the rule of Rogers is similarly inapplicable.

Finally, in Zenco Engineering Co. v. C.I.R., 75 T.C. 318 (1980), the tax court held that to prove mishandling by the postal service



of a properly addressed and mailed notice of deficiency, "more is required than the bald testimony of a taxpayer....that [he] never got the letter." Id. at 323. As noted supra, the parties stipulated that the notice was correctly addressed and properly mailed. It is doubtful that Petitioner Gordon's testimony that the signature on the receipt was not that of his wife, and that they never received the notice, is anything more than the "bald testimony" referenced in Zenco.

The tax court did not err in determining that it had no jurisdiction over the petition, because the 90-day period to file for redetermination had expired. The language of section 6212 and the law of this circuit are clear: a notice of deficiency is valid if properly mailed, and actual receipt by the taxpayer is not mandated.



B. Constitutional Issues

A defendant must be afforded reasonable notice and an opportunity to be heard before his or her rights are determined with finality. See Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314 (1950); see also Eisenberg v. C.I.R., 47 T.C.M. 729, 730 (1983) (Tax Code notice provisions "were designed to afford a taxpayer notice of the Commissioner's determination and an opportunity to litigate the validity of such determination in this Court without first paying the claimed deficiency"). The method of notice must be reasonably likely to provide actual notice. "[A] notice of deficiency which does not satisfy the minimum statutory requirements for notice cannot reasonably be considered a notice of deficiency." Roskos v. C.I.R., 850 F.2d 514, 517 (9th Cir. 1988), cert. denied, 489 U.S. 1012 (1989); see also O'Brien v. C.I.R.,



62 T.C. 543, 550 (1974) ("If mailing of a notice of deficiency to a taxpayer is to be any more than an empty gesture, there should be some reasonable expectation that the taxpayer will receive it.")

Petitioners argue that certified mail, absent restricted delivery, is not a reasonable procedure for providing notice of a tax deficiency, and therefore deprives them of due process.

There is nothing within the language of Section 6212 that requires restricted delivery. In fact, the statute expressly provides that certified mail is sufficient as a form of delivery. Neither the language of the statute, its legislative history, nor the cases interpreting Section 6212 have ever indicated that restricted delivery is constitutionally required. See, e.g., Eisenberg, 47 T.C.M. at 731 (citing 65 Cong. Rec. 2970 (1924) (statute



does not require that notices be sent certified mail with return receipt requested).

This circuit has held that the use of certified or registered mail to the taxpayer's last known address "give[s] the notice great potential to reach the taxpayer." Roskos, 850 F.2d at 517.

Regarding the constitutional requirements of notice, Cohen v. United States, 297 F.2d 760 (9th Cir.), cert. denied, 369 U.S. 865 (1962), held, "[W]e find no constitutional weakness in the use of the authorized method of sending the 90-day letter, even in those cases where it may not actually be received." Id. at 772. Cohen further noted that, unlike Mullane, petitioners rights would not be totally cut off by the act of denying a late petition.

Failure to petition the [Tax Court] within 90 days of the mailing of the letter does deprive the taxpayer of a privilege, namely, withholding payment of the tax pending determination of the validity and

correctness of the assessment by the [Tax Court]. But it does not deprive him of all right to contest the validity or correctness of the assessment; he can still do this by paying the tax, filing a claim for refund, and if that be denied, suing in the District Court or Court of Claims....[Mullane et al.] deal with the cutting off of all rights, not of one of two alternative remedies provided to the taxpayer by the Congress as a matter of grace.

Cohen, 297 F.2d at 72 (citations omitted).

The cases cited by Petitioners are inapposite, and do not support the contention that the current system of notice deprived Petitioners of their due process rights. The use of certified mail without restricted delivery for notices of tax deficiency does not violate due process.

Petitioners also argue that the postal service's current system of certified mail delivery violates equal protection, because no identification is required if the same mail is collected at the post office. Petitioners cite

us to no legal authority that would support this contention.

The general rule of equal protection law is that "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985). This rule gives way when the government actions bases disparate treatment of individuals on a suspect or quasi-suspect classification. Id. Because no suspect classifications have been alleged here, we apply a rational basis standard of review.

The postal service has a rational basis for requiring that identification be presented to collect mail from the post office, but not at one's residence, as it is fair to assume that those at a residence live there and have a right to collect mail there. Petitioners'



argument therefore lacks merit.

CONCLUSION

The Tax Court did not err in determining that it had no jurisdiction over the petition for redetermination of liability. The notice of deficiency was sent in compliance with 26 U.S.C. Section 6212, and this court has repeatedly held that if the notice is properly sent, lack of actual receipt does not invalidate the notice. The system of non-restricted delivery certified mail does not violate Petitioners' due process rights, and the postal system's requirements for showing identification do not violate equal protection.

AFFIRMED